Supreme Court, U.S.
FILED

07-80 JUL 18 2007

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

GEORGE M. MILLER, JR., M.D.,
GEORGE M. MILLER, JR., M.D., P.C.,
f/k/a BARIATRIC SURGERY CLINIC, P.C.,
Petitioners,

v.

STEVEN SCOTT, SURVIVING HUSBAND OF
ELIZABETH SUZANNE SCOTT, DECEASED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

PHILLIP NORTH
Counsel of Record
EDWARD A. HADLEY
NORTH, PURSELL, RAMOS
& JAMESON, PLC
414 UNION STREET
BANK OF AMERICA PLAZA, SUITE 1850
NASHVILLE, TN 37219
(615) 255-2555
Counsel for Petitioners

July 18, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Should a district court's determination upon summary judgment that the proffered testimony of a medical expert witness did not meet the requirements of a Tennessee statute be reviewed under a *de novo* standard or an abuse of discretion standard?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff - Sixth Circuit Appellant - Respondent: Steven Scott.

Defendants - Sixth Circuit Appellees - Petitioners: George M. Miller, Jr., M.D. and George M. Miller, Jr., M.D., P.C.

RULE 29.6 STATEMENT

Petitioner George M. Miller, Jr., M.D., P.C. has no parent corporation, and no publicly held corporation owns ten percent 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 14.1(b) STATEMENT ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

Factual Background 5

Lower Court Proceedings 6

REASONS FOR GRANTING THIS PETITION . . . 10

I. A Split Among Circuits Exists as to Whether Determinations Regarding the Admissibility of Expert Testimony Pursuant to State Substantive Law Should

Be Reviewed Under an Abuse of Discretion or *De Novo* Standard of Review. 10

II. This Court Has Not Established the Standard of Review Applicable to Expert Testimony Determinations Pursuant to State Law. 14

III. The Sixth Circuit's Analysis of the Proffered Expert's Testimony Has So Far Departed from the Accepted and Usual Course of Proceedings as to Call for an Exercise of This Court's Supervisory Power. 16

IV. Applying an Abuse of Discretion Standard of Review Conflicts with Tennessee State Law and Will Encourage Forum Shopping and Will Result in Inequitable Administration of the Laws. 19

CONCLUSION 21

APPENDIX

Appendix A: Order of the United States Court of Appeals for the Sixth Circuit (filed Apr. 19, 2007) 1a

Appendix B: Decision of the United States Court of Appeals for the Sixth Circuit (filed Nov. 20, 2006) 6a

Appendix C: Order of the United States District Court for the Middle District of Tennessee, Nashville Division (filed Oct. 18, 2005) 24a

Appendix D: Tenn. Code Ann. § 29-26-115 (a), (b) (2007) 33a

TABLE OF AUTHORITIES

Cases **Page(s)**

Bravo v. Sumner Regional Health Systems, Inc.,
148 S.W.2d 357 (Tenn. Ct. App. 2003) 20

Brown v. Brown,
48 F.3d 1215, 1995 WL 105279 (4th Cir. Mar. 14, 1995) 11

Cortes-Irizarry v. Corporacion Insular de Seguros,
111 F.3d 184 (1st Cir. 1997) 11

Cronkrite v. Fahrbach,
853 F. Supp. 257 (W.D. Mich. 1994) 12

Crumley v. Memorial Hosp., Inc.,
509 F. Supp. 531 (E.D. Tenn. 1978) 13

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) . . . 3, 5, 8, 10, 12, 13, 14, 15

Denton v. United States,
731 F. Supp. 1034 (D. Kan. 1990) 13

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 15, 19

Gasperini v. Center for Humanities, Inc.,
518 U.S. 415 (1996) 19

General. Elec. Co. v. Joiner,
522 U.S. 136 (1997) 3, 8, 14

Higgenbottom v. Noreen,
586 F.2d 719 (9th Cir. 1978) 12

In re Paoli Railroad Yard PCB Litigation,
35 F.3d 717 (3d Cir. 1994) 12

Jeffress v. Reddy,
77 F. App'x 627, 2003 WL 22293579, 62 Fed. R. Evid. Serv. 1372 (4th Cir. Oct. 7, 2003) 11

Kenyon v. Handal,
122 S.W.3d 743 (Tenn. Ct. App. 2003) 20

Kourkounakis v. Russo,
167 F. App'x 255, 2006 WL 354642 (2d Cir. Feb. 14, 2006) 11

Kuhmo Tire Co. v. Carmichael,
526 U.S. 137 (1999) 3, 9, 14, 15

Legg v. Chopra,
286 F.3d 286 (6th Cir. 2002) 12

Mabon v. Jackson-Madison County General Hosp.,
968 S.W.2d 826 (Tenn. Ct. App. 1997) 20

McDowell v. Brown,
392 F.3d 1283 (11th Cir. 2004) 12

Myers v. Medical Center of Delaware, Inc.,
105 F. App'x 403, 2004 WL 1690150 (3d Cir. July 29, 2004) 12

Peck v. Tegtmeyer,
834 F. Supp 903 (W.D. Va. 1992) 13

Ralph v. Nagy,
749 F. Supp. 169 (M.D. Tenn. 1990) 12

Roberts v. Bicknell,
73 S.W.3d 106 (Tenn. Ct. App. 2001) 20

Russell v. Wendt,
929 F2d 703, 1991 WL 46395 (7th Cir. Apr. 4, 1991) 12

Slifcak v. Northern Mich. Hosps., Inc., No. 90-CV-565, 1991 WL 626469 (W.D. Mich. Aug. 19, 1991) 12

Sullivan v. U.S. Dept. of Navy,
365 F.3d 827 (9th Cir. 2004) 12

Tucker v. American Tel. & Tel. Corp.,
794 F. Supp. 240 (W.D. Tenn. 1992) 12

Tusshani v. U.S.,
6 F. App'x 812, 2001 WL 331961 (10th Cir. Apr. 5, 2001) 12

Wilson v. Patterson,
73 S.W.3d 95 (Tenn. Ct. App. 2002) 20

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 6

40 Pa. Cons. Stat. § 1303.512 4

730 Ill. Comp. Stat. 5/5-2-5 4

735 Ill. Comp. Stat. 5/2-622 4

735 Ill. Comp. Stat. 5/8-2501 4

Ala. Code § 6-5-548 3

Alaska Stat. § 09.20.185 3

Ariz. Rev. Stat. § 12-2604 3

Ark. Code Ann. § 16-114-207 3

Colo. Rev. Stat. § 13-64-401 3

Conn. Gen. Stat. § 52-184c 4

Del. Code Ann. tit. 18, § 6853-54 4

Fla. Stat. § 766.102 4

Fla. Stat. § 90.702 4

Ga. Code Ann. § 24-9-67.1 4

Idaho Code § 6-1012-13 4

Iowa Code § 147.139 4

Iowa Code § 232B.10 4

Kan. Stat. Ann. § 60-3412 4

La. Rev. Stat. Ann. § 9:2794 4

Md. Cts. & Jud. Proc. Code Ann. § 3-2A-02 4

Mich. Comp. Laws § 600.2169 4

Miss. Code Ann. § 11-1-61 4

Miss. Code Ann. § 13-1-409 4

Mo. Rev. Stat. § 490.065 4

Mont. Code Ann. § 26-2-601 4

Mont. Code Ann. § 41-3-102 4

Mont. Code Ann. § 72-12-402 4

N.C. Gen. Stat. § 8C-1, Rule 702 4

N.J. Rev. Stat. § 2A:53A-41 4

N.M. Stat. Ann. § 41-5-23 4

Ohio Rev. Code Ann. § 2743.43 4

Okla. Stat. tit. 63, § 1-1708.1I 4

R.I. Gen. Laws § 9-19-41 4

S.C. Code Ann. § 15-36-100 4

Tenn. Code Ann. § 29-26-115 4

Tenn. Code Ann. § 29-26-115(a) & (b) 1

Tenn. Code Ann. § 29-26-115(a)(1) 7, 9, 10

Tex. Civ. Prac. & Rem. Code Ann. § 74.401-03 . . 4

Va. Code Ann. § 8.01-581.20 4

W. Va. Code § 30-16-18 4

W. Va. Code § 55-7B-7 4

Rules

Fed. R. Evid. 104(a) 13

Fed. R. Evid. 601 . . . . . 12, 13

Fed. R. Evid. 702 . . . . . 9, 10, 12, 13

Other Authorities

27 Charles A. Wright & Victor J. Gold, Federal Practice and Procedure § 6003 (1990) 13

James F. Duff, Jr., LL.B., Annotation, *Malpractice Testimony: Competency of Physician or Surgeon from One Locality to Testify, in Malpractice Case, as to Standard of Care Required of Defendant Practicing in Another Locality*, 37 A.L.R.3d 420 (1971) 4, 14

John M. Conley, Scott W. Gaylord, *Scientific Evidence in the State Courts, Daubert and the Problem of Outcomes*, 44 NO. 4 Judges' J. 6 (2005) 13

Robin Kundis Craig, *When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court*, 77 Denv. U. L. Rev. 69 (1999) 3, 13, 14

PETITION FOR WRIT OF CERTIORARI

Petitioners George M. Miller, M.D. and George M. Miller, M.D. P.C. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Amended Opinion of the Sixth Circuit Court of Appeals upon Petition for ReHearing and En Banc Hearing is found in Appendix A.

The original Opinion of the Sixth Circuit Court of Appeals is found in Appendix B.

The Opinion of the District Court is found in Appendix C.

JURISDICTION

The Amended Opinion of the Sixth Circuit Court of Appeals upon Petition for ReHearing and En Banc Hearing was entered on April 19, 2007.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Tennessee Code Annotated §§ 29-26-115(a) & (b) are attached as Appendix D and state:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by

subsection (b): (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred; (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals reviewed under a *de novo* standard the District Court's determination that the Plaintiff's medical expert was not qualified to offer testimony

pursuant to Tennessee's medical malpractice statute. Under this standard, the Sixth Circuit substituted it's own judgment for the judgment of the District Court rather than defer to the District Court's decision. Because a State statute rather than Federal Procedural law established the standards for admissibility of expert testimony, the Sixth Circuit avoided the holdings of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997), and *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999), which hold that decisions regarding the admissibility of expert testimony must be reviewed under an abuse of discretion standard.

Although this Court has addressed the application of the abuse of discretion standard of review for the admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny, this Court has not addressed the whether an abuse of discretion standard of review should be applied to a district court's determination of the admissibility of expert testimony pursuant to a State statute. The circuit courts are divided on this issue. The Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits have elected to review such determinations under an abuse of discretion standard. The First, Fourth, and Sixth Circuits, however, have analyzed these determinations under a *de novo* standard of review.

Most States have laws establishing standards for admissibility of expert testimony offered by experts in medical malpractice cases.[1] *See* Robin Kundis Craig, *When*

---

[1] The following State statutes address medical expert testimony: Alabama, Ala. Code § 6-5-548; Alaska, Alaska Stat. § 09.20.185; Arizona, Ariz. Rev. Stat. § 12-2604; Arkansas, Ark. Code Ann. § 16-114-207; Colorado, Colo. Rev. Stat. § 13-64-401; Connecticut,

Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court, 77 Denv. U. L. Rev. 69, 72, n.15 (1999); James F. Duff, Jr., LL.B., Annotation, *Malpractice Testimony: Competency of Physician or Surgeon from One Locality to Testify, in Malpractice Case, as to Standard of Care Required of Defendant Practicing in Another Locality*, 37 A.L.R.3d 420 (1971). Federal district courts sitting in diversity are frequently called upon to apply such State laws when determining whether an expert is qualified to offer opinions and whether the expert opinions are themselves admissible. Widely varying approaches to these questions have evolved in the circuit and district courts. As a result, different standards of review are being applied to the same substantive determinations of admissibility of expert testimony.

Conn. Gen. Stat. § 52-184c; Delaware, Del. Code Ann. tit. 18, § 6853-54; Florida, Fla. Stat. §§ 90.702, 766.102; Georgia, Ga. Code Ann. § 24-9-67.1; Idaho, Idaho Code § 6-1012-13; Illinois, 730 Ill. Comp. Stat. 5/5-2-5, 735 Ill. Comp. Stat. 5/8-2501, 5/2-622; Iowa, Iowa Code §§ 147.139, 232B.10; Kansas, Kan. Stat. Ann. § 60-3412; Louisiana, La. Rev. Stat. Ann. § 9:2794; Maryland, Md. Cts. & Jud. Proc. Code Ann. § 3-2A-02; Michigan, Mich. Comp. Laws § 600.2169; Mississippi, Miss. Code Ann. §§ 11-1-61, 13-1-409; Missouri, Mo. Rev. Stat. § 490.065; Montana, Mont. Code Ann. §§ 26-2-601, 41-3-102, 72-12-402; New Jersey, N.J. Rev. Stat. § 2A:53A-41; New Mexico, N.M. Stat. Ann. § 41-5-23; North Carolina, N.C. Gen. Stat. § 8C-1, Rule 702; Ohio, Ohio Rev. Code Ann. § 2743.43; Oklahoma, Okla. Stat. tit. 63, § 1-1708.1I; Pennsylvania, 40 Pa. Cons. Stat. § 1303.512; Rhode Island, R.I. Gen. Laws § 9-19-41; South Carolina, S.C. Code Ann. § 15-36-100; Tennessee, Tenn. Code Ann. § 29-26-115; Texas, Tex. Civ. Prac. & Rem. Code Ann. § 74.401-03; Virginia, Va. Code Ann. § 8.01-581.20; West Virginia, W. Va. Code §§ 30-16-18, 55-7B-7.

District court determinations regarding the admissibility of expert testimony upon a motion for summary judgment should be uniformly reviewed under an abuse of discretion standard regardless of whether Federal procedural law or State substantive law governs. *Daubert* and its progeny squarely established that when Federal procedural law establishes the requirements for the admissibility for expert testimony such determinations of admissibility are to be reviewed under an abuse of discretion standard. The standard of review should not differ when State law rather than Federal procedural law governs the admissibility of expert testimony. The Petitioners respectfully request that this Court unify the standard of review for all determinations regarding the admissibility of expert testimony upon summary judgment.

Factual Background

Plaintiff's spouse, a Georgia resident, was morbidly obese and sought surgical treatment for her obesity from Defendant George M. Miller, Jr., M.D., who practiced in Nashville, Tennessee. On October 17, 2001, Mrs. Scott saw Dr. Miller for evaluation for laparoscopic Roux-en-Y gastric bypass weight loss surgery to her. On November 15, 2001, Dr. Miller performed the surgery at Centennial Medical Center in Nashville, Tennessee. On November 18, 2001, Mrs. Scott was discharged from Centennial Medical Center and returned to her home in Georgia. On November 19, 2001, Mrs. Scott's family contacted Dr. Miller by telephone several times during the day to report various complaints. Dr. Miller recommended that she be taken to the nearest hospital emergency room that evening. Mrs. Scott was taken to a local hospital where she underwent surgery. A leak was discovered in an anastomosis created during the gastric bypass surgery. The Georgia surgeon elected to reverse the gastric bypass Dr. Miller had created. Mrs. Scott suffered

complications and expired on November 28, 2001 when she was removed from life support.

Lower Court Proceedings

The Plaintiff originally commenced this medical malpractice action in the Circuit Court for Davidson County, Tennessee on November 13, 2002. Discovery was conducted. However, the Plaintiff voluntarily dismissed his action on the eve of the disclosure date for expert witnesses supporting his claims. The Plaintiff then commenced this action in Federal court on November 5, 2004 making the same allegations as in the State court action. Jurisdiction existed in the District Court on the basis of diversity jurisdiction, 28 U.S.C. § 1332.

On March 3, 2005, Dr. Miller and his professional corporation filed a properly supported Motion for Summary Judgment. The Plaintiff filed a response in opposition supported by the affidavit of Jeffrey W. Allen, M.D. Recognizing Dr. Allen's lack of qualifications to offer expert testimony and the lack of facts and data supporting his opinions, the Defendants sought permission to file a reply brief pursuant to the District Court's local rules. The Plaintiff then filed a second affidavit from its proffered expert, Dr. Allen. Thereafter, the Defendants filed a reply memorandum challenging the qualifications of the Plaintiff's proffered expert.

On October 18, 2005, the District Court entered an Order and memorandum granting the Defendants' Motion for Summary Judgment. The District Court determined that the Plaintiff's expert was not qualified under Tennessee law to offer opinion testimony and that he failed to demonstrate that he had sufficient knowledge of the standard of care applicable to Dr. Miller in Nashville, Tennessee:

Dr. Allen's affidavit lacks a sufficient factual showing of his knowledge of the recognized standard of acceptable professional practice in Nashville or a medical community similar to Nashville. Dr. Allen's affidavit is also too conclusory to establish his familiarity with this particular specialty. Dr. Allen makes the conclusory assertion that "doctors in both communities have equal access to...state of the art equipment, consulting and proctoring physicians for advice and training, and medical information in general." Dr. Allen, however, does not provide any knowledge of "state of the art equipment" for this practice in Nashville. Dr. Allen does not state that he has performed surgeries or supervised surgeries in Nashville. Nor does Dr. Allen identify these "similar communities" where he has proctored surgeries."

To comply with Tennessee law, Plaintiff's expert must offer more specific facts of his knowledge the identity of the relevant physicians in the Nashville area and their methods and practices of surgeons in Nashville during the relevant time period. Without such facts or data, the Court cannot conclude whether there is a sufficient predicate to establish the relevant community standard under Tennessee law. Dr. Allen's affidavit describes a regional or national or international standard of care and such a standard does not meet the requirements of Tenn. Code Ann. § 29-26-115(a)(1).

For these reasons, the Court concludes that Dr. Allen is not a qualified expert under Tennessee law and without a qualified expert, the Plaintiff's proof fails to support a judgment on his claims. Thus, the

> Defendants' motion for summary judgment should be granted. (App. C).

On October 25, 2005, the Plaintiff filed a Notice of Appeal challenging the Order granting the Defendants' motion for summary judgment.

On November 20, 2006, the Sixth Circuit issued an opinion reversing the District Court. In rejecting the abuse of discretion standard of review, the Sixth Circuit applied a *de novo* standard of review because the issue regarding Dr. Allen's proffered expert testimony "was resolved in the context of summary judgment." The Sixth Circuit's opinion stated:

> The district court's summary judgment decision rested on the finding that Dr. Allen's affidavit was insufficient as a matter of law, *i.e.* there was no genuine issue as to a material fact regarding whether Dr. Allen satisfied the requirements of Tennessee law. Although the issue has evidentiary overtones, the appropriate standard of review of the district court's decision is *de novo* because the issue was resolved in the context of summary judgment.

Notably, one justice wrote an opinion concurring in the result but disagreeing with the majority's opinion that Dr. Allen's affidavit satisfied Tennessee's statute governing medical malpractice experts.

The Defendants filed a Petition to Rehear and for En Banc Hearing challenging the Court's use of the *de novo* standard of review. The Defendants relied upon *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General.*

Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997) and *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

In response, the Sixth Circuit issued a new opinion on April 19, 2007 substituting a new paragraph in its opinion to explain its application of the *de novo* standard of review. The Sixth Circuit explained that the District Court's finding that "Dr. Allen [was] not a qualified expert under Tennessee law" was not an evidentiary ruling. Instead, the Sixth Circuit characterized the District Court ruling as a determination of whether the standard of care actually described by the proffered expert was sufficient to create a genuine issue of material fact:

> [T]he district court did not determine that Dr. Allen was not qualified as an expert under Rule 702, a conclusion which we would review for an abuse of discretion. Instead, the district court's summary judgment decision rested on the finding that Dr. Allen's affidavit was insufficient as a matter of law, i.e., that there was no genuine issue as to a material fact regarding whether the evidence of the applicable standard of care set forth in Dr. Allen's affidavit satisfied the requirements of Tennessee law.

The Sixth Circuit further explained in a footnote:

> Admittedly, the district court's opinion is not entirely clear. At one point, the district court states that "Dr. Allen is not a qualified expert under Tennessee Law," Dist. Ct. Op'n at 6, although one line earlier, the district court states that the evidence of the standard of care set forth in Dr. Allen's affidavit "does not meet the requirements of Tenn. Code Ann. § 29-26-115(a)(1). Reviewing the district

> court's analysis in its entirety, we believe that the district court did not determine that Dr. Allen was not qualified as an expert under Rule 702, but instead the district concluded that the evidence of the applicable standard of care set forth in Dr. Allen's affidavit did not meet the requirements of Tenn. Code Ann. § 29-26-115(a)(1). (App. A).

Contrary to the Sixth Circuit's characterization, an analysis of the District Court's entire memorandum opinion reveals that District Court was concerned about the reliability of the proffered expert's opinion because it was "too conclusory" and not supported by facts and data. These are the same determinations made by the trial courts in *Daubert* and its progeny. *Daubert* and its progeny establish an abuse of discretion standard of review. Yet, the Sixth Circuit applied a *de novo* standard of review and substituted its own determination regarding the admissibility of the proffered expert's testimony.

REASONS FOR GRANTING THIS PETITION

I. A Split Among Circuits Exists as to Whether Determinations Regarding the Admissibility of Expert Testimony Pursuant to State Substantive Law Should Be Reviewed Under an Abuse of Discretion or *De Novo* Standard of Review.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny, this Court addressed the admissibility of expert testimony under Federal procedural law and held that an abuse of discretion standard was the correct standard for review of determinations of admissibility. However, *Daubert* and its progeny did not address determinations of admissibility of expert testimony made

pursuant to State law by a district court sitting in diversity. In the absence of guidance from this Court, several circuit courts have applied conflicting standards of review in such cases.

Like the Sixth Circuit in this case, the First and Fourth Circuits have applied a *de novo* standard of review to district court decisions regarding an expert's testimony pursuant to State law in the course of summary judgment proceedings. *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184 (1st Cir. 1997) (applying Puerto Rico law); *Jeffress v. Reddy*, 77 F. App'x 627, 2003 WL 22293579, 62 Fed. R. Evid. Serv. 1372 (4th Cir. Oct. 7, 2003) (applying North Carolina law).[2]

In conflict with the First, Fourth, and Sixth Circuits are the Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits which have applied an abuse of discretion standard when reviewing district court decisions regarding an expert's testimony pursuant to State law in the course of summary judgment proceedings. *Kourkounakis v. Russo*, 167 F. App'x 255, 2006 WL 354642 (2d Cir. Feb. 14, 2006) (applying

---

[2] In *Jeffress*, the court employed an analysis similar to the analysis used by the Sixth Circuit in this case. The *Jeffress* court characterized the issue before it as whether the evidence of causation from the proffered experts satisfied the requirements of State law. Yet, the court actually examined and analyzed whether the proffered expert's opinions were supported by sufficient knowledge of facts of the patient's condition and medical history. This decision was reviewed under a *de novo* standard. *Id.* at *632, **5. *But see Brown v. Brown*, 48 F.3d 1215, 1995 WL 105279 (4th Cir. Mar. 14. 1995) (applying Virginia law and an abuse of discretion standard when reviewing the district court's determination that that the proffered expert was "unqualified" to offer expert testimony under the State law requirements).

New York Law); *Myers v. Medical Center of Delaware, Inc.*, 105 F. App'x 403, 2004 WL 1690150 (3d Cir. July 29, 2004) (applying Delaware law); *Russell v. Wendt*, 929 F2d 703, 1991 WL 46395 (7th Cir. Apr. 4, 1991); *Sullivan v. U.S. Dept. of Navy*, 365 F.3d 827 (9th Cir. 2004) (applying California law); *Tusshani v. U.S.*, 6 F. App'x 812, 2001 WL 331961 (10th Cir. Apr. 5, 2001); *McDowell v. Brown*, 392 F.3d 1283 (11th Cir. 2004) (applying Georgia law).

The divergence in the Circuit Courts is not surprising given the varying approaches taken by district courts when analyzing the admissibility of expert testimony pursuant to State statutes. The Third, Sixth, Ninth, Tenth, and Eleventh Circuits have determined that both *Daubert* and State law may govern the admissibility of expert testimony. *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 750 (3d Cir. 1994); *Sullivan v. U.S. Dept. of Navy*, 365 F.3d 827 (9th Cir. 2004); *Tusshani v. U.S.*, 6 F. App'x 812, 2001 WL 331961 (10th Cir. Apr. 5, 2001); *McDowell v. Brown*, 392 F.3d 1283, 1295 (11th Cir. 2004).

The Sixth, Ninth, and Eleventh circuits have created a framework of analyzing an expert's competency pursuant to State Statute under Federal Rule of Evidence 601 and an expert's qualifications and actual testimony under Federal Rule of Evidence 702. *Legg v. Chopra*, 286 F.3d 286, 289-92 (6th Cir. 2002); *Higgenbottom v. Noreen*, 586 F.2d 719, 722 (9th Cir. 1978); *McDowell v. Brown*, 392 F.3d 1283, 1295 (11th Cir. 2004).[3] These decisions conflict with this

[3] A number of district courts have followed this analysis: *See Cronkrite v. Fahrbach*, 853 F. Supp. 257, 259 (W.D. Mich. 1994); *Tucker v. American Tel. & Tel. Corp.*, 794 F. Supp. 240, 245 (W.D. Tenn. 1992); *Slifcak v. Northern Mich. Hosps., Inc.*, No. 90-CV-565, 1991 WL 626469, at *2 (W.D. Mich. Aug. 19, 1991); *Ralph v. Nagy*, 749 F. Supp. 169, 172-73 (M.D. Tenn. 1990);

Court's suggestion, in the absence of a substantive State law regarding expert testimony, that a trial judge must assess the qualifications of any expert pursuant to Federal Rule of Evidence 104(a). *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, n. 10 (1993).

Contrary to these circuits, learned legal writers have firmly asserted that Rule 601 "has nothing to do with other questions of legal status that have also been called questions of competence. Thus, Rule 601 does not deal with...the admissibility of expert opinion testimony, often referred to as involving the competency to testify as an expert." 27 Charles A. Wright & Victor J. Gold, Federal Practice and Procedure § 6003 (1990). The authors further comment, "It should be clear that Rule 601 does not pertain to the so-called competency of expert witnesses to testify in the form of an opinion. Testimony by experts is governed by Rule 702, which specifies that a witness may be qualified as an expert by virtue of knowledge, skill, experience, training or education." *Id.* Other writers have advocated different approaches for reconciling *Daubert* and State statutes governing the admissibility of expert testimony. *See* Robin Kundis Craig, *When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court,* 77 Denv. U. L. Rev. 69 (1999); John M. Conley, Scott W. Gaylord, *Scientific Evidence in the State Courts, Daubert and the Problem of Outcomes*, 44 NO. 4 Judges' J. 6 (2005).

Denton v. United States, 731 F. Supp. 1034, 1036 (D. Kan. 1990); *Crumley v. Memorial Hosp., Inc.*, 509 F. Supp. 531, 532 n.2 (E.D. Tenn. 1978). *But see Peck v. Tegtmeyer*, 834 F. Supp 903, 910 (W.D. Va. 1992) (holding that Rule 702 governs the admissibility of medical experts even if the question can be viewed as one of competency).

All determinations of the admissibility of expert testimony involve analyses of whether the expert is qualified and whether the expert's opinions are supported by sufficient facts or data to make them reliable. These analyses are not significantly changed when State law rather than Federal procedural law provides the criteria against which the expert's testimony must be measured. District Courts should have the same wide discretion to make determinations of the admissibility of expert testimony regardless of whether Federal procedural law or State substantive law applies.

II. This Court Has Not Established the Standard of Review Applicable to Expert Testimony Determinations Pursuant to State Law.

This case presents an important question. This Court has confirmed in three separate opinions the application of the abuse of discretion standard of review for the admissibility of expert testimony under Federal procedural law in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997); and *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). However, this Court has not addressed the standard of review to be applied to a district court's expert testimony determination when a State statute rather than Federal procedural law provides the criteria for admissibility.

Most States prescribe unique burdens of proof and requirements for the admissibility of expert testimony in medical malpractice cases. *See supra* note 1; Robin Kundis Craig, *When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court*, 77 Den. U.L. Rev. 69, 72, n.15 (1999); James F. Duff, Jr., LL.B., Annotation, *Malpractice Testimony: Competency of Physician or Surgeon from One Locality to Testify, in Malpractice Case,*

as to Standard of Care Required of Defendant Practicing in Another Locality, 37 A.L.R.3d 420 (1971). Federal courts sitting in diversity are required to apply these State statutes. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

When expert testimony is measured against Federal procedural law, "a court of appeals is to apply an abuse-of-discretion standard when it 'review[s] a trial court's decision to admit or exclude expert testimony." *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Furthermore, "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable...The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Id.*

In spite of these clear statements of law in *Kuhmo*, the circuit courts have already begun to diverge on the correct application of the Federal Rules of Evidence to analyze the admissibility of expert testimony under State statutes and the correct standard for reviewing such decisions. This Court's review is necessary to complete the course begun by *Daubert* and its progeny and establish a uniform standard of review for determinations of the admissibility of expert testimony regardless of whether Federal procedural law or State substantive law governs admissibility.

III. The Sixth Circuit's Analysis of the Proffered Expert's Testimony Has So Far Departed from the Accepted and Usual Course of Proceedings as to Call for an Exercise of This Court's Supervisory Power.

The Sixth Circuit's characterization of the District Court's decision is severely flawed in spite of its attempt to correct its opinion. The Sixth Circuit's characterization lacks logic and is not supported by the record. Exercise of this Court's supervisory power is necessary to correct this error, which the Sixth Circuit is determined to perpetuate.

The Sixth Circuit framed the issue regarding the admissibility of the proffered expert's testimony as a question of law subject to *de novo* review rather than a question of admissibility subject to abuse of discretion review. The Sixth Circuit characterized the District Court's determination not as whether the plaintiff's proffered expert was qualified or whether his testimony was admissible. Instead, the Sixth Circuit characterized the District Court's determination as whether the evidence of the standard of care described by the proffered expert was sufficient to create a genuine issue of material fact as to the standard of care applicable to the Defendant physician. This distinction is not supported by the record.

If the Sixth Circuit's characterization were accurate, then an issue would exist as to the proffered expert's description of what actions the standard of care required the defendant physician to take or not take in his care and treatment of the patient. For example, the issue might be the sufficiency of the proffered expert's description of how a surgical technique should or should not be performed or the expert's description

of the circumstances under which a test should be performed or not performed.

However, the Sixth Circuit's characterization was not the issue decided by the District Court. Indeed, the proffered expert's affidavit offered very concrete opinions as to what he believed the standard of care required the Defendant physician to do or not do in this case. Thus, if the Plaintiff's proffered expert were qualified and his opinions admissible, then certainly a genuine issue of material fact would exist between the Defendant physician's description of the actions the standard of care required him to take and the proffered expert's description of the actions the standard of care required the Defendant to take. However, the District Court focused upon the bases for and the reliability of the proffered expert's opinions rather than on the expert's opinion of the actions he believed the standard of care required the Defendant to take.

Contrary to the Sixth Circuit's characterization, the District Court did not find fault in the proffered expert's opinion of the actions the defendant physician should or should not have taken. This aspect of the proffered expert's opinion was not discussed. Instead, the District Court analyzed whether the bases for the proffered expert's opinion were reliable and supported by facts and data.

The District Court analyzed whether the opinions of the proffered expert were reliable and admissible under Tennessee law. Indeed, all of the District Court's comments about the Plaintiff's proffered expert were directed to the reliability of the facts and data supporting the expert's opinion. The District Court wrote in its memorandum opinion:

> Dr. Allen's affidavit lacks a sufficient factual **showing of his knowledge** of the recognized standard of acceptable professional practice in Nashville or a medical community similar to Nashville. Dr. Allen's affidavit **is also too conclusory** to establish his familiarity with this particular specialty...Dr. Allen, however, **does not provide any knowledge** of "state of the art equipment" for this practice in Nashville. Dr. Allen **does not state that he has performed surgeries or supervised surgeries in Nashville**. Nor does Dr. Allen **identify these "similar communities"** where he has proctored surgeries."
>
> To comply with Tennessee law, Plaintiff's expert **must offer more specific facts of his knowledge** the identity of the relevant physicians in the Nashville area and their methods and practices of surgeons in Nashville during the relevant time period. **Without such facts or data, the Court cannot conclude whether there is a sufficient predicate** to establish the relevant community standard under Tennessee law. (App. C) (emphasis added).

The District Court's memorandum focuses upon the lack of support for the proffered expert's opinions and the lack of reliability of the testimony. The memorandum does not focus on the proffered expert's description of the actual standard of care. Because the District Court's focus was upon the lack of factual support and lack of reliability, the District Court was analyzing the admissibility of the proffered expert testimony. The Sixth Circuit should have given the District Court wide discretion to determine the admissibility of the proffered expert's testimony.

The Sixth Circuit's characterization of the District Court's ruling is not supported by the record. The District Court's determination focused upon the reliability and facts and data supporting the proffered expert's testimony. Such determinations address the admissibility of the expert's testimony, and should be uniformly subject to an abuse of discretion standard of review regardless of whether the criteria for admissibility are established by State statute or Federal procedural law.

IV. Applying an Abuse of Discretion Standard of Review Conflicts with Tennessee State Law and Will Encourage Forum Shopping and Will Result in Inequitable Administration of the Laws.

The District Court's jurisdiction was based upon diversity. "Absent a federal question, 'the law to be applied in any case is the law of the state." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996) (citations omitted).

The outcome of this case should not turn on whether it is pending in State or Federal Court. Yet, the Sixth Circuit's application of a *de novo* standard of review did indeed alter the outcome. If summary judgment had been granted by a Tennessee trial court, the Tennessee Court of Appeals would have reviewed the decision under an abuse of discretion standard and affirmed the trial court's rejection of the Plaintiff's expert testimony. By dismissing this case in State court and re-filing the case in Federal court, the Plaintiff was

able to obtain a more favorable standard of review and diminish the trial court's discretion regarding expert testimony. As a result, forum shopping is encouraged because diversity litigants wishing for a more favorable standard of review will choose to file in Federal district courts rather than Tennessee State courts.

Tennessee Courts have uniformly applied an abuse of discretion standard when reviewing trial court determinations regarding challenges to expert testimony upon motions for summary judgment. In the following Tennessee appellate court opinions an abuse of discretion standard of review was applied to trial courts' determinations materially indistinguishable to the determinations of the District Court in this case: *Mabon v. Jackson-Madison County General Hosp.*, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997); *Roberts v. Bicknell*, 73 S.W.3d 106, 113-114 (Tenn. Ct. App. 2001); *Wilson v. Patterson*, 73 S.W.3d 95 (Tenn. Ct. App. 2002); *Bravo v. Sumner Regional Health Systems, Inc.*, 148 S.W.2d 357, 363-64 (Tenn. Ct. App. 2003); and *Kenyon v. Handal*, 122 S.W.3d 743, 758-59 (Tenn. Ct. App. 2003).

The outcome of this State law case should not have been altered because it happened to be pending in a Federal Court a few blocks away from a Tennessee State trial court. The Sixth Circuit's ruling creates a divergence from State law. Under the Sixth Circuit's present ruling, Tennessee district court decisions excluding expert testimony within summary judgment proceedings will be reviewed differently from the same types of decisions in Tennessee State Courts. This Petition for Writ of Certiorari should be granted to prevent inequitable administration of Tennessee law and forum shopping.

CONCLUSION

District Courts engage in the same types of analyses when determining the admissibility of expert testimony regardless of whether Federal procedural law or State substantive law establishes the criteria for admissibility. When such determinations are made pursuant to Federal procedural law, it is well settled that such determinations will be reviewed under an abuse of discretion standard. The standard of review should not be altered when State substantive law provides the criteria for admissibility. The Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari to answer this important procedural question and resolve the divergent procedural approaches among the Circuit Courts.

Respectfully submitted,

Phillip L. North
Counsel of Record
Edward A. Hadley
NORTH, PURSELL, RAMOS & JAMESON, P.L.C.
Bank of America Plaza, Suite 1850
414 Union St.
Nashville, TN 37219-1782
(615) 255-2555
(615) 255-0032 (Fax)

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-6671/6754

[Filed April 19, 2007]

STEVEN SCOTT, SURVIVING HUSBAND OF ELIZABETH SUZANNE SCOTT, DECEASED, Plaintiff-Appellant,	)
v.	)
GEORGE M. MILLER, JR., M.D., ET AL., Defendants-Appellees.	)

ORDER

BEFORE: BATCHELDER and MOORE, Circuit Judges; and COHN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Batchelder adheres to her concurrence. The panel majority deletes the second full paragraph on page 5, and substitutes the following language:

> Defendants, however, argue that we must review the summary judgment ruling for abuse of discretion. Defendants say that because the district court's summary judgment ruling was based on a factual finding that Dr. Allen was not qualified as an expert under Tennessee law it was essentially an evidentiary ruling. This simple assertion belies a complex question, but, after careful review, we disagree with defendants.

The interaction between Tennessee law and federal law in this diversity case requires us to apply different substantive law and different standards of review at various points. The question of whether an expert is qualified to give expert testimony is governed by Federal Rule of Evidence 702. *See Legg v. Chopra*, 286 F.3d 286, 289-92 (6th Cir. 2002) (determining that the competency standards for expert witnesses set forth in TENN. CODE ANN. § 29-26-115(b) are applicable in diversity cases via Federal Rule of Evidence 601, but that Rule 702 governs whether a witness is qualified to give expert testimony); 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4512 (2d ed. 1996) ("If a Federal Rule of Evidence covers a disputed point of evidence,

the Rule is to be followed, even in diversity cases, and state law is pertinent only if and to the extent the applicable Evidence Rule makes it so."). Tennessee law dictates the particular matters about which an expert must have "knowledge, skill, experience, training, or education" and "sufficient facts or data," FED. R. EVID. 702, but the sufficiency of the expert's qualifications is governed by Rule 702 and is reviewed for abuse of discretion.

Assuming the expert is qualified to give expert testimony as to the standard of care, the district court must still determine whether the evidence of the applicable standard of care set forth by the expert via affidavit, testimony, or other means meets the requirements of TENN. CODE ANN. § 29-26-115(a)(1), which establishes the elements of a medical malpractice action, and is sufficient to withstand a motion for summary judgment. The sufficiency of this evidence is reviewed de novo. *Holloway*, 220 F.3d at 772.

In this case, the district court did not determine that Dr. Allen was not qualified as an expert under Rule 702, a conclusion which we would review for an abuse of discretion. Instead, the district court's summary judgment decision rested on the finding that Dr. Allen's affidavit was insufficient as a matter of law, *i.e.*, that there was no genuine issue as to a material fact regarding whether the evidence of the applicable standard of care set forth in Dr. Allen's affidavit satisfied the requirements of Tennessee law.[2] Accordingly, we review *de*

---

[2] Admittedly, the district court's opinion is not entirely clear. At one point, the district court states that "Dr. Allen is not a qualified expert under Tennessee law." Dist. Ct. Op'n at 6, although one line earlier, the district court states that the evidence of the standard of care set forth in Dr. Allen's affidavit "does not meet the requirements of TENN. CODE ANN. § 29-26-115(a)(1), *id.*

novo the district court's determination,[3] and, for the reasons stated below, we conclude that plaintiff has established a genuine issue of material fact regarding the standard-of-care element of a Tennessee malpractice action, as set forth in Tenn. Code Ann. § 29-26-115(a)(1).

Reviewing the district court's analysis in its entirety, we believe that the district court did not determine that Dr. Allen was not qualified as an expert under Rule 702, but instead the district court concluded that the evidence of the applicable standard of care set forth in Dr. Allen's affidavit did not meet the requirements of TENN. CODE ANN. § 29-26-115(a)(1).

[3] We recognize that we have previously reviewed a district court's decision related to TENN. CODE ANN. § 29-26-115(a)(1) for abuse of discretion. *See Sommer v. Davis*, 317 F.3d 686, 692-95 (6th Cir. 2003). That decision is not inconsistent with our decision here. As we noted above, the qualifications of an expert are governed by Rule 702 and reviewed for abuse of discretion. Under Rule 702, in order to give expert testimony, a witness must be qualified by "knowledge, skill, experience, training, or education," and the testimony must be based on "sufficient facts or data." FED. R. EVID. 702. In *Sommer*, as in this case, Tennessee law dictated the matters about which an expert must have "knowledge, skill, experience, training, or education" and "sufficient facts or data." The *Sommer* court reviewed a determination by a district court that a witness "did not have *knowledge*" of the standard of care as set forth in TENN. CODE ANN. § 29-26-115(a)(1). *Sommer*, 317 F.3d at 692 (emphasis added). Accordingly, it appears to us that in *Sommer*, unlike in this case, the court was reviewing a district court's determination regarding the qualifications of an expert, a determination properly reviewed for abuse of discretion.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

/?

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 05-6671/6754

[Filed November 20, 2006]

STEVEN SCOTT, Surviving Husband of Elizabeth Suzanne Scott, Deceased, Plaintiff-Appellant (05-6671) Plaintiff-Appellee (05-6754),	)
v.	)
GEORGE M. MILLER, JR., M.D., GEORGE M. MILLER, JR., M.D., P.C., F/k/a BARIATRIC SURGERY CLINIC, P.C., and CENTENNIAL MEDICAL CENTER, Defendants-Appellees (05-6671) Defendants-Appellants (05-6754).	)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 06a0849n.06

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BEFORE: BATCHELDER and MOORE, Circuit Judges; COHN,* District Judge.

AVERN COHN, District Judge. This is a medical malpractice case. Plaintiff, Steven Scott, as surviving husband of Elizabeth Suzanne Scott, appeals from the district court's grant of summary judgment to defendants George M. Miller, Jr., M.D., and George M. Miller, Jr., M.D., P.C. f/k/a Bariatric Surgery Clinic, P.C.[1] Defendants appeal the denial of their motion to permit discovery depositions of expert witnesses. The appeal raises two issues: (1) whether plaintiff's medical expert met the qualifications under the Tennessee Medical Malpractice Act, Tenn. Code Ann. § 29-26-115(a)(1), with respect to knowledge of the professional standard of care; and (2) whether the district court erred in denying defendants' motion to permit discovery. For the reasons that follow, we REVERSE the district court's summary judgment ruling and REMAND the case for further proceedings, including a determination of whether depositions of the proposed medical experts should be taken.

---

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] Initially, plaintiff also sued Centennial Medical Center. Plaintiff later dismissed it as a defendant.

I.

A.

Suzanne Scott was a thirty-year-old woman who, on October 17, 2001, sought consultation for gastric bypass surgery[2] with Dr. George Miller.[3] On November 15, 2001, Dr. Miller performed laparoscopic Roux-en-Y gastric bypass weight loss surgery on Mrs. Scott at Centennial Medical Center in Nashville, Tennessee. Plaintiff alleges, *inter alia*, that Dr. Miller failed to properly close Mrs. Scott's bowels, leaving two leaks and causing toxins to spread into her abdominal cavity. Defendants, however, maintain that a failure to follow discharge instructions may have lead to the failure of the surgical bowel connection and the development of leaks. In any event, Mrs. Scott remained in the hospital for three days after the surgery during which time she complained of not feeling well. Mrs. Scott was eventually discharged on a Sunday. By Monday night, Mrs. Scott was quite ill, and was taken to the hospital and admitted for emergency surgery to repair two large leaks. By that time, she had a massive infection. Mrs. Scott died eight days later from sepsis.

---

[2] Gastric bypass is a procedure in which the majority of the stomach is cut off to create a small pouch to permit only a small amount of food to be consumed and thereby induce weight loss.

[3] Plaintiff spent a good deal of time discussing Dr. Miller's qualifications. As defendants point out, Dr. Miller's qualifications are not at issue.

B.

On November 5, 2004, plaintiff filed a medical malpractice complaint against defendants[4] in federal court.

On January 21, 2005, the district court entered a Case Management Order which stated in part:

> In order to reduce the needless expenditure of time and expense, there shall not be any discovery depositions taken of expert witnesses.
>
> Local Rule 12(c)(6)(c) (effective March 1, 1994) relating to expert witnesses shall apply in this action, and strict compliance is required.

On January 24, 2005, the district court entered Case Management Order No. 2 which said the following regarding expert witnesses:

> Expert witness disclosures shall be made in accordance with Fed. R. Civ. P. 26(a)(2) or as has been otherwise ordered by the Court. No expert witness shall testify beyond the scope of his or her expert witness disclosure. The Court may exclude or strike testimony of an expert witness, or order other sanctions provided by law, for violation of the expert witness disclosure requirements.

---

[4] Plaintiff previously filed a medical malpractice complaint in state court on November 13, 2002. Plaintiff voluntarily dismissed the case prior to expert witness disclosure.

On March 3, 2005, defendants filed a motion for summary judgment on the grounds that plaintiff failed to make out a medical malpractice case under Tennessee law. In response, plaintiff filed the affidavit of Jeffrey W. Allen, M.D., plaintiff's medical expert, who stated that he was familiar with the standard of care in Nashville, Tennessee and that Dr. Miller failed to comply with that standard. Plaintiff, with permission from the district court, filed a supplemental affidavit from Dr. Allen. Defendants then filed a reply brief challenging Dr. Allen's qualifications under Tennessee's Medical Malpractice statute based on the supplemental affidavit.

On October 7, 2005, defendants filed a motion to permit the parties to conduct discovery depositions of experts. On October 11, 2005, the district court denied the motion, prior to receiving a response from plaintiff, essentially on the grounds that there was no showing of need to deviate from the case management orders.

On October 18, 2005, the district court granted defendants' motion for summary judgment, holding that Dr. Allen failed to satisfy the "locality rule" under Tennessee's Medical Malpractice Act. Without this evidence, the district court held that plaintiff failed to make out a case for medical malpractice and, as such, granted summary judgment to defendants.

Plaintiff appeals the district court's summary judgment decision. Defendants cross appeal the denial of their motion for discovery depositions.

II.

A.

1.

The first issue on appeal is the district court's summary judgment ruling which we review *de novo*. *Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Defendants, however, argue that the standard of review is an abuse of discretion. Defendants say that because the district court's summary judgment ruling was based on a factual finding that Dr. Allen was not qualified as an expert under Tennessee law it was essentially an evidentiary ruling. We disagree. The district court's summary judgment decision rested on the finding that Dr. Allen's affidavit was insufficient as a matter of law, *i.e.* there was no genuine issue as to a material fact regarding whether Dr. Allen satisfied the requirements of Tennessee law. Although the issue has evidentiary overtones, the appropriate standard of review of the district court's decision is *de novo* because the issue was resolved in the context of summary judgment.

2.

a.

Tenn. Code Ann. § 29-26-115(a) sets forth a plaintiff's burden in a medical malpractice action, providing:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which he practices or in a similar community at the time the alleged injury or wrongful action occurred;
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

Subsection (a)(1) is commonly referred to as the "locality rule," which requires that a "medical expert relied upon by the plaintiff must have knowledge of the standard of professional care in the defendant's applicable community *or* knowledge of the standard of professional care in a community that is shown to be similar to the defendant's community." *Robinson v. LeCorps*, 83 S.W.3d 718, 724 (Tenn. 2002) (emphasis added).

Case law has further shaped the contours of the locality rule.[5] In *Kenyon v. Handal*, 122 S.W.3d 743, 761-62 (Tenn. Ct. App. 2003), the Tennessee Court of Appeals explained:

> The expert is not required to be familiar with all the medical statistics of the community where the physician practices. *Ledford v. Moskowitz*, 742 S.W.2d 645, 648 (Tenn. Ct. App. 1987). However, the expert must go further than simply asserting that he or she is familiar with the applicable standard of care. *Mabon v. Jackson-Madison County Gen. Hosp.*, 968 S.W.2d at 831. The expert must present facts demonstrating how he or she has knowledge of the applicable standard of professional care either in the community in which the defendant physician practices or in a similar community. *Spangler v. East Tenn. Baptist Hosp.*, No. E1999-01501-COA-R3-CV, 2000 WL 222543, at *1-2 (Tenn. Ct. App. Feb. 28, 2000) *perm. app. denied* (Tenn. Sept. 11, 2000).
>
> For the purpose of Tenn. Code Ann. § 29-26-115(a), the only relevant "community" is the community in which the defendant physician actually practices or in a similar community. *Tilley v. Bindra*, No. W2001-01157-COA-R3-CV, 2002 WL 1000196, at *4-5 (Tenn. Ct. App. May 13, 2002) *perm. app. denied* (Tenn. Nov. 4, 2002). Accordingly, the courts have held that medical experts testifying for a patient

---

[5] It is worth noting that the majority of the cases cited by the parties concern the exclusion of a plaintiff's medical expert's testimony, either at deposition or at trial, not the dismissal of a medical malpractice action on summary judgment for failure of the expert to satisfy the locality rule.

> in a medical malpractice case may not base their testimony solely on their familiarity with a national standard of professional practice. *Robinson v. LeCorps*, 83 S.W.3d at 724; *Mabon v. Jackson-Madison County Gen. Hosp.*, 968 S.W.2d at 831. We have likewise rejected expert testimony based on a state-wide standard of professional practice, *Totty v. Thompson*, 121 S.W.3d at 678-79; *Tilley v. Bindra*, 2002 WL 1000196, at *4 (holding that the relevant standard of professional practice is not a nationwide or even a statewide standard of care), as well as testimony premised on a regional standard of professional practice. *Howell v. Baptist Hosp.*, 2003 WL 112762, at *8 (holding that an affiant's assertion of familiarity with the applicable standard of professional practice in "Middle Tennessee" did not provide a basis for testifying regarding the standard of professional practice in Nashville).

In *Kenyon*, the court of appeals found that the plaintiff's medical expert's affidavit failed to satisfy the locality rule because

> it does not contain sufficient facts to demonstrate that Dr. Kumar's opinion regarding the applicable standard of professional practice is based either on his familiarity with the applicable standard of professional practice in Gallatin or Sumner County or on his knowledge of the applicable standard of professional practice in a community similar to Gallatin or Sumner County. Nothing in Dr. Kumar's affidavit indicates that he has any personal knowledge of the practice of obstetrics and gynecology in Gallatin or Sumner County. Accordingly, he can comply with Tenn. Code Ann. § 29-26-115(a)(1) only by demonstrating that he

> knows the applicable standard of professional practice in a community that is similar to Gallatin or Sumner County.
>
> Dr. Kumar does not assert that Douglasville, Georgia where he practices is similar to Gallatin or Sumner County. He bases his familiarity with the applicable standard of care of an obstetrician in January 1998 at the Sumner Regional Medical Center in Gallatin on his conclusion that the standards of professional practice in the State of Georgia are the same as those in the State of Tennessee. Generalizations regarding the similarity of the standards of professional care in two contiguous states are not specific enough information to demonstrate that a medical practitioner is qualified under the locality rule to render an opinion in a medical malpractice case.

Id. at 762.

Defendants rely heavily on *Mabon v. Jackson-Madison County Gen. Hosp.*, 968 S.W.2d 826 (Tenn. Ct. App. 1997), implying that the Tennessee Court of Appeals created a sort of "checklist" for demonstrating familiarity with the standard of care. Defendants listed several "facts" taken from *Mabon* which they say an expert must provide in order to satisfy the locality rule, which include: (1) visiting the defendant's city; (2) knowing where the city is located; (3) knowing the population of the city; (4) knowing an individual in that city; (5) knowing physicians in the city; (6) knowing the number of physicians in the city; (7) knowing the number of hospitals in the city; (8) knowing the size of the hospital of where the care at issue was provided; (9) knowing the number of beds in the hospital; (10) knowing the medical specialities available in the

hospital; (11) treating a patient from the city; (12) reviewing medical records from the city; (13) knowing information about medical schools in the city; (14) knowing whether teaching hospitals are in the city; and (15) knowing information about colleges and universities in the city.

Defendants' reading of *Mabon* is misplaced. The court in *Mabon* did not suggest that the above items are required to establish familiarity with the standard of care. Indeed, defendants' list is taken from the court's discussion of the plaintiff's proposed expert's *deposition* testimony where he was *cross-examined* as to each of these items of his knowledge and he eventually admitted to not having knowledge of the relevant medical community. Furthermore, in *Mabon*, the plaintiff's expert testified that his opinion was based on a national standard of care, which was the crux of the court of appeals' decision affirming the district court's exclusion of his testimony. The case did not turn on the expert's failure to confirm his knowledge to a predetermined set of facts.

Plaintiff cites *Hunter v. Ura*, 163 S.W.3d 686 (Tenn. 2005), in which the Tennessee Supreme Court considered whether a plaintiff's expert physician satisfied the locality rule and was properly allowed to testify at trial. The court held that the expert was qualified, explaining:

> Dr. Witt was a board-certified anesthesiologist who had practiced in Lexington, Kentucky since 1980. Dr. Witt testified that he was involved with the Academic Association of Anesthesia Program Directors, which was an organization "with people from Vanderbilt, from Lexington, and the surrounding area." Dr. Witt had attended a meeting of the Southern University Department of Anesthesia Chairs at Vanderbilt in

> Nashville, Tennessee. Dr. Witt stated that he had been to Nashville six or seven times, that he knew the Chair at Vanderbilt's anesthesia department very well, and that he was "familiar, in a regional setting, [with] the general kinds of care offered [ ] in Lexington as well as in Nashville." Dr. Witt discussed several hospitals in Nashville and stated that the standard of professional care in this case "would be approximately the same as what we would see at some of the hospitals where I have been in Nashville."

Id. at 708.

Finally, in *Sommer v. Davis*, 317 F.3d 686 (6th Cir. 2003), a panel of this Court considered Tennessee's locality rule and held that the district court did not abuse its discretion in striking a plaintiff's proposed expert's testimony following a hearing and *sua sponte* granting summary judgment to defendant. In *Sommer*, the panel noted that the physician's acknowledgment that he did not "know any of the characteristics of the Nashville medical community" at the time of plaintiff's surgery pointed in favor of not finding an abuse of discretion. *Id.* at 695.

b.

Turning to this case, plaintiff submitted an affidavit and supplemental affidavit of Dr. Allen. Plaintiff also submitted Dr. Allen's credentials and his *curriculum vitae*. Attached to the supplemental affidavit was Dr. Allen's Rule 26 report. As to his familiarity with the standard of care, Dr. Allen stated that he was familiar both with the standard of care in Nashville, Tennessee and in Louisville, Kentucky, which he stated was a similar community to Nashville. His Rule 26 report states in part:

My practice is in Louisville, Kentucky. Louisville has a medical community that is very similar to the medical community in Nashville, Tennessee. While Louisville is smaller than Nashville, both cities have multiple hospitals, both have respected medical schools, and doctors in the both communities have equal access to medical educational opportunities, state of the art medical equipment, consulting and proctoring physicians for advice and training, and medical information in general. Additionally, there are many surgeons in Nashville, Tennessee who perform laparoscopic Roux-en-Y gastric bypass procedures and these surgeons follow up as I do in Louisville, Kentucky. In short, the doctors in Nashville, Tennessee who comply with the standard of care, perform laparoscopic Roux-en-Y gastric bypass surgery the same way I do in Louisville, Kentucky. Centennial Medical Center, at which Dr. Miller was working at the time he operated on Mrs. Scott, has access to the same quality medical equipment that I have at Norton Hospital, the hospital where I do the majority of my work. In addition to my Kentucky licensure, I am licensed in a number of other states - including Tennessee. I have lectured about gastric bypass surgery in Nashville to physicians practicing there; and I have proctored numerous surgeries in communities similar to Nashville. I am familiar with the standard of care in Nashville, Tennessee and similar communities that governs the conduct of doctors like Dr. Miller and me when we perform Roux-en-Y gastric bypass procedures and provide medical care following these procedures.

The district court granted summary judgment to defendants upon finding that Dr. Allen's affidavit failed to comply with the locality rule. The district court stated:

> Dr. Allen's affidavit lacks a sufficient factual showing of his knowledge of the recognized standard of acceptable professional practice in Nashville or a medical community similar to Nashville. Dr. Allens's [sic] affidavit is also too conclusory to establish his familiarity with this particular speciality. Dr. Allen makes the conclusory statement that "doctors in both communities have equal access to ... state of the art equipment, consulting and proctoring physicians for advice and training and medical information in general." Dr. Allen, however, does not provide any knowledge of "state of the art equipment" for this practice in Nashville. Dr. Allen does not state that he has performed surgeries or supervised surgeries in Nashville, nor does Dr. Allen identify these "similar communities" where he has proctored surgeries.
>
> To comply with Tennessee law, Plaintiff's expert must offer more specific facts of his knowledge [sic] the identity of the relevant physicians in the Nashville area and their methods and practices of surgeons in Nashville during the relevant time period. Without such facts or data, the Court cannot conclude whether there is a sufficient predicate to establish the relevant community standard under Tennessee law. Dr. Allen's affidavit describes a regional or international standard of care and such a standard does not meet the requirements of Tenn. Code Ann. § 29-26- 115(a)(1).
>
> For these reasons, the Court concludes that Dr. Allen is not a qualified expert under Tennessee law

> and without a qualified expert, the Plaintiff's proof fails to support a judgment on his claims. Thus, the Defendants' motion for summary judgment should be granted.

JA at p. 164-65.

We disagree with the district court's interpretation of Dr. Allen's knowledge of the standard of care. Dr. Allen states he is a board certified surgeon with extensive experience in performing, proctoring, and lecturing about gastric bypass procedures. He travels in the Southeastern United States where he comes into contact with physicians from Nashville. He states he is familiar with the standard of care in Nashville and notes the similarities between Nashville and Louisville in terms of having multiple hospitals, respected medical schools, access to medical information, state of the art equipment, and consulting physicians. In our view, this evidence is sufficient to satisfy the locality rule under Tennessee law. Contrary to the district court's interpretation, we do not find that Tennessee law, as set forth above, imposes specific requirements such as identifying what "state of the art equipment" exists in Nashville. While in order to satisfy the locality rule, a medical expert must offer "facts" to support his or her knowledge of the standard of care, Dr. Allen's supplemental affidavit did set forth such facts. This is not a case where the expert is wholly unfamiliar with the locality where the defendant-physician practices or fails to explain a similar community. In other words, it is a case like *Hunter*, not *Kenyon*, *Mabon*, or *Sommers*. Dr. Allen expressed knowledge of the Nashville standard of care and the standard of care in a similar community (Louisville) in sufficient detail in his affidavits and Rule 26 Report. We find that Dr. Allen's supplemental affidavit satisfies the requirements of the locality rule under Tenn. Code Ann. § 29-26-115(a)(1). As such,

plaintiff provided evidence sufficient to survive summary judgment. *See Wilson v. Patterson*, 73 S.W.3d 95, 105 (Tenn. Ct. App. 2001) (holding that the expert's statement that "the Lexington, Kentucky area is a similar area to Memphis, Tennessee with regard to the standard of care of acceptable professional medical practice in the field of obstetrics and gynecology and in regard to the medical services provided in this area. Both Lexington, Kentucky and Memphis, Tennessee are regional medical centers and are the locations of their state medical schools" although meager, was sufficient to withstand summary judgment).

B.

The next issue on appeal is the district court's denial of defendants' motion to permit discovery depositions which is reviewed for an abuse of discretion. *See Coleman v. American Red Cross*, 23 F.3d 1091 (6th Cir. 1994). In light of finding that the district court erred in granting summary judgment to defendants, we believe the better course is to remand the matter to the district court to consider whether, notwithstanding the local rule to the contrary, expert depositions are appropriate under the circumstances.

III.

For the reasons stated above, the decision of the district court is **REVERSED** and the case is **REMANDED** for further proceedings consistent with this opinion.

ALICE M. BATCHELDER, Circuit Judge, concurring. I agree with the lead opinion that we must reverse the district court's grant of summary judgment and remand the case for further proceedings; however, I disagree with its reasoning in

reaching this result. Specifically, I object to the opinion's finding that the evidence provided in Dr. Allen's affidavit satisfied Tennessee's locality rule for medical experts. See Tenn. Code Ann. § 29-26-115(a)(1).

Tennessee's locality rule requires a medical expert witness to show either that (1) she practices in the same community as the defendant or (2) she practices in a community similar to that in which the defendant practices. Id. Dr. Allen's affidavit is insufficient to show that he is familiar with the standard of care in Nashville, Tennessee, where Dr. Miller practiced. While he states that he has lectured in Nashville and has read articles written by Nashville physicians, he does not provide any detail of these educational endeavors or indicate how these experiences demonstrate his knowledge of the standard of care in Nashville. Moreover, Dr. Allen's statements do not establish that Louisville, Kentucky -- the community in which he practices -- is similar to Nashville, Tennessee. While he states that both cities have multiple hospitals, respected medical schools, and equal access to medical information and equipment, he fails to support these generalized statements with statistics, and such bald assertions are insufficient to satisfy the locality rule. See, e.g., Bravo v. Sumner Reg'l Health Sys., Inc., 148 S.W.3d 357, 368-69 (Tenn. Ct. App. 2003) (finding that the locality rule was satisfied where the medical expert produced statistical evidence establishing the similarity between two cities). As interpreted by Tennessee courts, the locality rule sets a more exacting 16 evidentiary standard than was satisfied by Dr. Allen's affidavit in this case. See Roberts v. Bicknell, 73 S.W.3d 106, 113 (Tenn. Ct. App. 2001) (noting that an expert must do more than recite the language of the statute to show familiarity with a similar community). Consequently, I cannot agree with my colleagues that the locality rule was satisfied in this case.

While I would not find that Dr. Allen's affidavit standing alone was sufficient to satisfy the locality rule, I would certainly conclude that it contained enough evidence to create a genuine issue of material fact on the issues of whether he was familiar with the standard of care in Nashville and whether Louisville was a community similar to Nashville. See, e.g., Wilson v. Patterson, 73 S.W.3d 95, 105 (Tenn. Ct. App. 2001) (finding that "meager" evidence which demonstrated the similarity between two cities was "sufficient to withstand attack at the summary judgment stage of the proceeding"). The affidavit was thus sufficient to survive a motion for summary judgment, and the district court erred in granting the defendants' motion. The generalized statements in Dr. Allen's affidavit could have been further developed during his deposition or trial testimony, and the parties should have been afforded this opportunity.

I also disagree with the lead opinion's implicit conclusion that Local Rule 12 of the United States District Court for the Middle District of Tennessee permits the district court to preclude the taking of depositions of medical experts. Under that rule, the judge "may require that the direct testimony of an expert witness, other than a medical expert, be reduced to writing" and "read . . . to the trier of facts." M.D. TENN. LOC. R. 12(C)(6)(C). The express language of this rule exempts medical experts from its requirements. I therefore would hold that the district court erred in applying Local Rule 12(c)(6)(C) to prohibit the defendants' deposition of Dr. Allen.

Despite disagreeing with the analysis of the lead opinion, I concur in the opinion's conclusion that the district court's grant of summary judgment should be reversed and the case remanded for further proceedings.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:04-0990

[Filed October 18, 2005]

STEVEN SCOTT, Surviving Husband of ELIZABETH SUZANNE SCOTT Deceased, Plaintiff,	)
v.	)
GEORGE M. MILLER, JR., M.D., GEORGE M. MILLER, JR., M.D., P.C. f/k/a BARIATRIC SURGERY CLINIC, P.C., Defendants.	)

JUDGE HAYNES

ORDER

In accordance with the Memorandum filed herewith, the Defendants' motion for summary judgment (Docket Entry No. 26) is **GRANTED.** This action is **DISMISSED** with prejudice. Each party shall bear its own costs.

This is the Final Order in this action.

It is so **ORDERED.**

ENTERED this the 17th day of October, 2005.

/s/
WILLIAM J.HAYNES, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:04-0990

[Filed October 18, 2005]

STEVEN SCOTT, Surviving Husband of)
ELIZABETH SUZANNE SCOTT)
Deceased,)
Plaintiff,)
)
v.)
)
GEORGE M. MILLER, JR., M.D.,)
GEORGE M. MILLER, JR., M.D., P.C.)
f/k/a BARIATRIC SURGERY CLINIC,)
P.C.,)
Defendants.)
)

JUDGE HAYNES

MEMORANDUM

Plaintiff, Steven Scott, surviving husband of Elizabeth Suzanne Scott, filed this action under 28 U.S.C. § 1332, the federal diversity statute against the Defendants: George M. Miller, Jr., M.D., George M. Miller, Jr., P.C., Bariatric Surgery Clinic, P.C. and Centennial Medical Center. Plaintiff asserts state law claims of negligence and malpractice. Plaintiff's specific claims are that: (1) Defendant Miller negligently failed to perform the surgery on his wife; (2) that Defendant Miller failed to "properly survey Ms. Scott's abdomen before completing the surgery, and thereby failing to discover and properly repair the anastomotic leak;" (3) that Defendant Miller failed to obtain Ms. Scott's informed consent; (4) that Defendant Miller lacked adequate training and skills for the surgery; and (5) that Defendant failed to provide medical, hospital and surgical services in accordance with the recognized standard of acceptable professional practice.

The parties proceeded with discovery. By agreed order, the Defendant HCA Health Services of Tennessee, Inc., during business as Centennial Medical Center was dismissed. (Docket Entry No. 52).

Before the Court is the Defendant George Miller's, and George M. Miller, Jr., P.C.'s motion for summary judgment (Docket Entry No. 26) contending, in sum, that the affidavits of Plaintiff's failed to state specific facts demonstrating the expert's familiarity with the applicable recognized standard of acceptable professional practice in the relevant community, as required by Tennessee law. Absent such compliance, Plaintiff's claims fail as a matter of law. In his response,

Plaintiff asserts that his expert's opinions are sufficient to reflect his knowledge of the relevant local community standards.

A. ANALYSIS OF PLAINTIFF'S EXPERT'S PROOF

In his initial affidavit, Dr. Jeffrey W. Allen, Plaintiff's expert who was educated in Kentucky and who practices in Louisville, Kentucky, cited his familiarity with the recognized standard of acceptable professional practice in Nashville. Dr. Allen, whose medical practice is in Louisville, Kentucky, deems Louisville a similar community for the recognized standard of acceptable professional practice. (Docket Entry No. 34, Allen Affidavit at ¶¶ 1, 2, and 4). Dr. Allen's first affidavit does not set forth the specific facts for his knowledge of the recognized standard of acceptable professional practice in Nashville and fails to cite specific facts for his comparison of the Nashville medical community to the Louisville medical community.

In his report attached to the supplemental affidavit, Dr. Allen cited his training and described his knowledge of the surgical procedure as follows:

> My practice is to regularly read relevant journals and medical texts relating to the performance of general surgery, gastric bypass surgery in general, and the Roux-en-Y procedure in particular. I also travel a great deal and interact with other gastric bypass surgeons throughout the Southeastern United States. As a result of all of this — the formal training, the literature review and my familiarity with he performance of this surgery, I have become aware of the standard of care for the performance of laparoscopic Roux-en-Y gastric bypass surgery and

> feel confident that I am competent to opine whether Dr. Miller failed to comply with the applicable standard of care, that applied to him as a surgeon performing laparoscopic Roux-en-Y gastric bypass surgery in Nashville, Tennessee, in treating Mrs. Scott."[1]

(Docket Entry No. 47, Attachment thereto at p. 1).

Dr. Allen also stated that: "[t]he methodology used to reach my opinions is the methodology used by physicians throughout the world who are involved in reviewing the level of care provided to patients and the consequences associated with any failures to meet the applicable standards of care." *Id.* at p. 7.

In his report, Dr. Allen cited the following facts for his opinion that the medical community in Louisville, Kentucky is "very similar" to the Nashville medical community. *Id.* at p. 2.

> "there are many surgeons in Nashville, Tennessee who perform laparoscopic Roux-en-Y gastric bypass procedures and these surgeons use the same methods to complete this type of operation and conform to the same post-surgery follow up as I do in Louisville, Kentucky." In short, the doctors in Nashville, Tennessee, who comply with the standard of care,

---

[1] Supplementary Affidavit of Jeffery W. Allen, M.D., Exhibit G, p. 1.

> perform laparoscopic Roux-en-Y gastric bypass surgery the same way I do in Louisville, Kentucky."

Id.

In his comparison of Nashville and Louisville medical communities, Dr. Allen also states:

> Centennial Medical Center, at which Dr. Miller was working at the time he operated on Mrs. Scott, has access to the same quality equipment hat I have at Norton Hospital, the hospital where I do the majority of my work. In addition to my Kentucky licensure, I am licensed in a number of other sates - including Tennessee. I have lectured about gastric bypass surgery in Nashville to physicians practicing there; and I have proctored numerous surgeries in communities similar to Nashville. I am familiar with the standard of care in Nashville, Tennessee and similar communities that governs the conduct of doctors like Dr. Miller and me when we perform Roux-en-Y gastric bypass procedures and provide medical care following these procedures.

(Docket Entry No. 47, Supplementary Affidavit of Dr. Jeffrey Allen, pp. 2 and 3).

B. CONCLUSIONS OF LAW

In this diversity action, the Court apples Tennessee law. *Erie R. Co. v. Tompkin*, 304 U.S. 64 (1938). Given that the Plaintiff's claims arise from surgery performed in Tennessee, the Tennessee Medical Malpractice Act, Tenn. Code Ann. § 29-26-101 et seq. applies.

As pertinent here, Tenn. Code Ann. § 29-26-115(a)(1)[2] requires any expert to be familiar with the standard of medical care in the relevant Tennessee community. "A medical expert relied upon by a plaintiff must have knowledge of the standard of professional care in the defendant's applicable community or knowledge of the standard of professional care in a community *that is shown to be similar* to the defendant's community." *Robinson v. LeCorps*, 83 S.W.3d 718, 724 (Tenn. 2002).(emphasis in the original).

Expert testimony premised upon a regional standard of care fails to demonstrate sufficient familiarity with the requisite community standard of care. *Kenyon v. Handal*, 122 S.W.3d 743 762 (Tenn. Ct. App. 2003) (citation omitted). An expert's standard of care defined in "Middle Tennessee" is legally insufficient. *Id.* An expert's familiarity with the standard of acceptable professional practice cannot be based upon national standard of care. *Id.* (citing *Robinson v. LeCorps*, 83 S.W.3d at 724; *Mahon v. Jackson-Madison County Gen Hosp.*, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997).

---

[2] The statute reads as follows:

> "(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the claimant practices or in a similar community at the time the alleged injury or wrongful action occurred."

"The expert must present facts demonstrating how he or she has knowledge of the applicable standard of professional care either in the community in which the defendant physician practices or in a similar community." *Kenyon*, 122 S.W.3d at 761 (citing *Robinson v LeCorps*, 83 S.W.3d at 724). *Accord Sommer v. Davis* 317 F.3d 686, 693 (6th Cir. 2003). Tennessee courts warn against the expert's recitation of "statutory buzz-word" or "conclusions in the language of 'the statute.'" *Roberts v. Bicknell*, 73 S.W.3d 106, 113 (Tenn. Ct. App. 2001).

"Without this requisite threshold evidence of the standard of care in the locality, a plaintiff cannot demonstrate a breach of duty." *Mahon v. Jackson-Madison County General Hosp.*, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997) (citing *Cardwell v. Bechtol*, 724 S.W.2d 739, 754 (Tenn. 1987)). Under Tennessee law, a physician's testimony of his methods under the same or similar circumstances does not satisfy the statutory standard. *See Lewis v. Hill*, 770 S.W.2d 751, 754 (Tenn. Ct. App. 1988); *see also Roddy v. Volunteer Medical Center*, 926 S.W.2d 572, 578 (Tenn. Ct. App.1996).

Dr. Allen's affidavit lacks a sufficient factual showing of his knowledge of the recognized standard of acceptable professional practice in Nashville or a medical community similar to Nashville. Dr. Allens's affidavit is also too conclusory to establish his familiarity with this particular speciality. Dr. Allen makes the conclusory assertion that "doctors in both communities have equal access to. . . state of the art equipment, consulting and proctoring physicians for advice and training, and medical information in general." Dr. Allen, however, does not provide any knowledge of "state of the art equipment" for this practice in Nashville.Dr. Allen does not state that he has performed surgeries or supervised

surgeries in Nashville. Nor does Dr. Allen identify these "similar communities" where he has proctored surgeries.

To comply with Tennessee law, Plaintiff's expert must offer more specific facts of his knowledge the identity of the relevant physicians in the Nashville area and their methods and practices of surgeons in Nashville during the relevant time period. Without such facts or data, the Court cannot conclude whether there is a sufficient predicate to establish the relevant community standard under Tennessee law. Dr. Allen's affidavit describes a regional or national or international standard of care and such a standard does not meet the requirements of Tenn. Code Ann. § 29-26-115(a)(1).

For these reasons, the Court concludes that Dr. Allen is not a qualified expert under Tennessee law and without a qualified expert, the Plaintiff's proof fails to support a judgment on his claims. Thus, the Defendants' motion for summary judgment should be granted.

An appropriate Order is filed herewith.

ENTERED this the 17th day of October, 2005.

/s/ _____
WILLIAM J. HAYNES, JR.
United States District Judge

APPENDIX D

TENNESSEE CODE ANNOTATED
Title 29 Remedies And Special Proceedings
Chapter 26 Medical Malpractice
Part 1 -General Provisions

Tenn. Code Ann. § 29-26-115 (2007). Claimant's burden in malpractice action - Expert testimony - Presumption of negligence - Jury instructions.

(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in

the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

* * *